Supreme Court, U.S.
FILED
SEP 14 1992
OFFICE OF THE CLERK

No. 91-1927

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

* Counsel of Record

No. 91-1927

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

* Counsel of Record

QUESTIONS PRESENTED

1. Does the United States Department of Interior, Fish and Wildlife Service's proposal and implementation of a plan of Federal acquisition for perpetual nondevelopment of water resource areas, in conflict with human water supply needs, constitute major Federal action which requires programmatic environmental review, or action which triggers the need for comprehensive review of cumulative impacts, under the National Environmental Policy Act?

2. Is Federal acquisition for perpetual nondevelopment of water resource areas, as a matter of law, excluded from the scope of review under the National Environmental Policy Act for consideration of potential impact of such acquisition on the human environment?

3. In applying its nondevelopment exception, did the Court of Appeals

improperly disregard significant indirect physical impacts of the Fish and Wildlife Service's proposal and implementation of acquisition for perpetual nondevelopment of water resource areas, which impacts include relocation of human water supply development and changed population patterns?

4. What is the proper standard of review of the Fish and Wildlife Service's threshold decision that the National Environmental Policy Act did not apply to its plan of Federal acquisition for nondevelopment of water resource areas?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION 1

STATEMENT 2

ARGUMENT ON REPLY TO BRIEFS IN OPPOSITION 2

1. RESPONDENTS' REFORMULATION OF QUESTIONS PRESENTED CHANGES THE SUBSTANCE OF THOSE QUESTIONS PRESENTED FOR REVIEW. 2

1.1 Proposal and Implementation as Constituting Major Federal Action..... 3

1.2 Cumulative Impacts Require Comprehensive Review..... 6

1.3 Scope of NEPA Applicable to Programmatic, Cumulative and Site-specific Impacts..... 7

1.4 Indirect Impacts Require NEPA Compliance..... 8

1.5 Standard of Review is Uncertain..... 11

2. FEDERAL RESPONDENTS' STATEMENT CONTRARY TO PRECEDENT AMONG FEDERAL AGENCIES. 11

CONCLUSION 19

SUPPLEMENTAL APPENDIX C

TABLE OF CONTENTS i

DEPARTMENT OF INTERIOR, 516 DM 2.3A Department of Interior, Departmental Manual C-42

54 FED. REG. 14173 Notice of Intent to Prepare an Environmental Impact Statement on a Proposed National Wildlife Refuge near Cokeville, WY C-46

57 FED. REG. 20849 Availability of a Final Environmental Impact Statement for the Proposed Stone Lakes National Wildlife Refuge in South Sacramento County, CA C-55

57 FED. REG. 33007 Notice of Record of Decision for the Establishment of the Stone Lakes National Wildlife Refuge, Sacramento County, CA C-65

TABLE OF AUTHORITIES

CASES *Page*

American Motorcyclist Ass'n v. Watt, 534 F.Supp. 923, 928 (C.D. Cal. 1981), aff'd, 714 F.2d 962 (9th Cir. 1983) 13,14

County of Del Norte v. U.S., 732 F.2d 1462 (9th Cir.) cert. denied, 105 S.Ct. 958 (1984) 14

Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985) 6

Lujan v. National Wildlife Federation, 110 S.Ct. 3177 (1990) 4

Statutes and Regulations

40 C.F.R. § 1508.7 6

40 C.F.R. § 1508.8 8

40 C.F.R. § 1508.18(b) 5

40 C.F.R. § 1508.23 5

Other Authorities

S.Ct. Rule 15.2 2

S.Ct. Rule 24 3

U.S. Fish and Wildlife Service, 30 AM 3.10D(2) 5

U.S. Department of Interior, 516 DM 2.3A (3) 13

54 Fed. Reg. 14173 16

57 Fed. Reg. 20849 18

57 Fed. Reg. 33007 ..... 15, 16, 17

No. 91-1927

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION

Petitioner Texas Water Conservation Association files this reply to object to Federal respondents' and Little Sandy Hunting and Fishing Club's reformulation of the questions presented upon petition and to address arguments first raised by briefs in opposition.

STATEMENT

Texas Water Conservation Association (TWCA) petitioned this court for writ of certiorari on June 2, 1992. Little Sandy Hunting and Fishing Club (Club) filed a brief in opposition under letter dated June 25, 1992. Both the Sierra Club and the National Audubon Society, and the Solicitor General on behalf of Federal respondents requested and were granted extensions of time. Ultimately, only the Federal respondents chose to file a brief in opposition.

ARGUMENT ON REPLY TO BRIEFS IN OPPOSITION

1. RESPONDENTS' REFORMULATION OF QUESTIONS PRESENTED CHANGES THE SUBSTANCE OF THOSE QUESTIONS PRESENTED FOR REVIEW.

Respondents' reformulation of the questions presented ignores critical elements of TWCA's petition and constitutes substantive change that is impermissible under rule 15.2. S.Ct.R. 15.2 (referencing

id. 24). If accepted, these changes would deny TWCA the review it seeks.

1.1 Proposal and Implementation as Constituting Major Federal Action.

TWCA's Question No. 1 asks in part whether "*proposal and implementation* of a plan of Federal acquisition for perpetual nondevelopment of water resource areas in conflict with human water supply needs constitutes major Federal action which requires programmatic environmental review." (Emphasis added). Federal respondents strip this question of several elements necessary to fair review when they ask simply whether "documents generally identifying regional . . . sites and outlining possible methods for their preservation constituted 'proposals for *** major federal actions.'" (Fed. Question No. 1).

Federal respondents most probably refer to the Texas Bottomland Hardwood Preservation Program Plan and the Land

Protection Program (LPP) Plan, the contents of which Federal respondents also mischaracterize within their question. These "documents" expressly recommend a proposed program of definite parameters in an identified geographic region, with a specific goal to be implemented as soon as possible. The Club easement FONSI itself cites the Program Plan and LPP Plan as *reasons why* no further environmental analysis of impact on the human environment would be done before implementation. The federal value judgment between use of water resources for human supply, and use as wildlife habitat is made within these "documents". They evidence much more about the agencies' proposal than Federal respondents' question represents.[1]

---

[1]With regard to the Club's argument concerning programmatic action, the Club misrepresents the holding in *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990). *Lujan* considered the issue of Administrative Procedure Act standing, not the requirements of NEPA. (See Club, pp. 4, 15-16).

More importantly, a proposal for major Federal action may exist in fact even if the acting agency does not declare it so in documents. *See* 40 C.F.R. § 1508.23 (App. B-56). TWCA's question asks the Court to look at the evidence as a whole. Consider that the formulation of goals, methods, timing objectives, and decisions regarding alternatives in the Program Plan and the LPP Plan; *and* the Club easement acquisition in reliance on these documents; *and* interrogatory answers stating an intention to pursue further acquisitions *all* evidence a proposal for major Federal action under the CEQ Regulations and agency criteria. *See, e.g.*, 40 C.F.R. §§ 1508.18(b), .23(App. B-54-56); 30 AM 3.10D(2) (App. C-38-41).

Respondents have offered no reason why the Court should not consider all evidence of a proposal for Federal action. Federal respondents should not be allowed, by their narrow restatement of questions presented,

to divert the Court from these additional factors. TWC urges the Court to accept its Question No. 1 in this regard.

1.2 Cumulative Impacts Require Comprehensive Review.

Federal respondents and the Club both eviscerate TWCA's question regarding "the need for comprehensive review of cumulative impacts". (TWCA Question No. 1). A ruling in favor of TWCA on this question *does not* require a determination that the regional plan must be independently analyzed within an EIS or an EA, as respondents' restated questions assume.

Under 40 C.F.R. § 1508.7 (App. B-50) and *Fritiofson v. Alexander,* 772 F.2d 1225 (5th Cir. 1985), Federal respondents were required to consider the Club easement together with all "reasonably foreseeable" future acquisitions for nondevelopment in *either* a separate comprehensive EA *or* within a cumulative impacts analysis *in the Club EA.* If the Court finds that future

acquisitions with cumulative impacts were reasonably foreseeable at the time of the Club easement acquisition, either because of the program planning documents or in Federal respondents' answers to interrogatories expressing an intent to pursue other acquisitions, then it should answer TWCA's question in this regard affirmatively.[2] Respondents offer no reason why the question of cumulative impacts should not be considered by this Court. TWCA urges the Court to accept its Question No. 1 also in this regard, and to reject respondents' contrary questions.

1.3 Scope of NEPA Applicable to Programmatic, Cumulative and Site-specific Impacts.

TWCA's Question No. 2 reflects that the lower courts' creation of an exclusion from NEPA for perpetual nondevelopment acquisitions extends to TWCA's claims for

---

[2]If the court sees a triable issue of fact, then summary judgment for Federal respondents was improper.

programmatic review, for comprehensive review of cumulative impacts, *and* as to the inadequacy of site-specific review of the Club easement acquisition. Both respondents improperly narrow this issue to apply only to the Club easement acquisition. (See Fed. Question No. 1; Club Question No. 1).

1.4 Indirect Impacts Require NEPA Compliance.

Both respondents, as did the courts below, ignore that acceptance of the Club easement for perpetual nondevelopment creates significant indirect physical impacts on the physical environment. (See TWCA Question No. 3). Indirect impacts are themselves sufficient to trigger NEPA review. *See* 40 C.F.R. § 1508.8 (App. B-51).

TWCA's uncontroverted affidavits show that proposed and implemented Federal action places additional stress on existing water supplies, and ultimately may affect

the health and safety of those dependent on such supplies; impacts planning and development of water supplies for human water needs; and creates conflicts among various governmental entities over remaining available supply sites. Where alternative supplies are available for future use, preclusion of primary sources will mandate the development of alternative supply sites, even if those sites are not the most environmentally sound or physically optimum choices. (Affidavits, App. D-87-89).

Federal respondents admit in their brief a critical fact. They state that "[e]ven if the easement would preclude the construction of a Waters Bluff Reservoir, the [EA] concluded . . . that foreseeable water supply development could be readily satisfied from other existing and proposed reservoirs." (Fed., p. 11, fn. 5).[3] To, in

[3]The Club EA also evidences the existence of cumulative impacts as it acknowledges that in the

the same brief, assert that the need to develop water supplies is an "exogenous factor" is flagrantly hypocritical. (See Fed., p. 9).

The Club simply writes indirect physical impacts out of TWCA's question. Federal respondents phrase their question to bury the issue in general verbiage. Respondents' questions refer, respectively to acceptance of "a purely negative easement, which neither causes nor permits any change in the physical environment" (Club Question No. 1) and to "an easement to preserve the existing physical environment". (Fed. Question No. 1).

Respondents offer no reason why indirect physical impacts should not be considered. Likewise, Federal respondents' brief never responds to the six pages of TWCA's petition addressed solely to the question

---

Upper Sabine River Basin alone, three proposed water supply reservoirs would be located in bottomland areas ranked highest priority for protection. (EA, p. 17).

of indirect physical impacts. (Petition, pp. 55-60). That FWS, and the lower courts in this case, ignored significant indirect physical impacts to the human environment is critical to TWCA's petition. TWCA urges the Court to carefully consider and accept TWCA's Question No. 3.

1.5 Standard of Review is Uncertain.

Respondents' questions plainly omit uncertainty among the Circuit Courts as to the proper standard of review of threshold decisions that NEPA does not apply. TWCA refers the Court to pages 60-63 of its petition and urges the Court to answer TWCA's Question No. 4.

2. FEDERAL RESPONDENTS' STATEMENT CONTRARY TO PRECEDENT AMONG FEDERAL AGENCIES.

TWCA's petition points out that by performing an EA on the Club non-development easement, Federal respondents "obviously viewed acquisition of the Club nondevelopment easement as an action

requiring NEPA review." (Petition, pp. 50-51). Nevertheless, Federal respondents' brief boldly asserts that acquisition of a preservation easement to prevent changes in the environmental status quo was "not the sort of action that NEPA was intended to reach."[4] (Fed., p. 10). While this statement picks up on the lower courts' judicially created exclusion to NEPA, it is inconsistent with the Federal respondents' actions in this case and with other instances of Federal agency application of NEPA.[5] Consider the following instances of

---

[4] TWCA contends, also contrary to Federal respondents, that the preservation easement was *not* intended to prevent changes in the environmental status quo as the human environment is properly considered under NEPA. The Club easement was intended to have the effect of preventing water supply development. Admin. Record, Vol. 2, Doc. No. 100-H. The human environmental status quo, that of water availability, is, in reality, changed.

[5] Federal respondents' statement in this regard also is contrary to the U.S. Department of Interior's own regulations. Even otherwise environmentally benign actions, that are categorically excluded from NEPA, are subjected to NEPA review when, among other things, the action may have controversial effects, establish a precedent for future action, or be related to other actions with individually

NEPA compliance in conservation activities by Federal agencies.

The Bureau of Land Management, Interior prepared an EIS on its California Desert Conservation Area Plan, an area identified by Congress as in need of protection. The statement served as both a programmatic EIS and as a site-specific EIS assessing the environmental impact of numerous site-specific actions. *American Motorcyclist Ass'n v. Watt*, 534 F.Supp. 923, 928 (C.D. Cal. 1981), *aff'd*, 714 F.2d 962 (9th Cir. 1983).[6] Site-specific statements, for example, were made as to

---

insignificant but ultimately significant environmental effect. Department of Interior, 516 DM 2.3A (3) (Supp. App. C-42-45).

[6]Substantive NEPA issues were only tangentially addressed in *American Motorcyclist*. The District Court however, did identify several defects in the defendant agencies' actions, including "failure to evaluate inconsistencies with local government plans". 714.F.2d at p. 964. The Ninth Circuit upheld the lower court's decision that "[d]espite the plaintiffs probability of success on the merits", the equities did not warrant issuing a preliminary injunction. *Id.* The appellate court did, however, call the lower courts' negative opinion of NEPA standing into serious doubt.

designation of 75 Acres of Critical Environmental Concern (ACEC). ACEC #4, the Saline Valley in Inyo County was so designated because it was a wildlife habitat. *Id.* As reflected in *County of Del Norte v. U.S.*, 732 F.2d 1462 (9th Cir.) *cert. denied*, 105 S.Ct. 958 (1984), the Department of Interior conducted NEPA review and prepared an EIS before designating parts of five California rivers as components of the national wild and scenic river system.[7]

The point that TWCA makes by reference to these cases is that Federal agencies *do* consider Federal action for nondevelopment the "sort of action" to which NEPA applies. At the same time Federal respondents deny this in their brief, they themselves move forward under NEPA with substantially

---

[7]The lower court's opinion in *County of Del Norte*, although unreported except at 11 Environmental Law Reporter 20,124, details more fully the NEPA issues brought by plaintiffs, including alleged defects as to the analysis of agency alternatives and insufficient opportunity for public comment.

similar actions, with, more importantly, similar *impacts* on the human environment. Federal respondents, for example, recently published in the Federal Register a summary of their record of decision for establishment of Stone Lakes National Wildlife Refuge in California, adopting an alternative recommended in a final EIS.

The Stone Lakes EIS was finalized after the agency "conducted seven public workshops and meetings to answer questions, disseminate information, and accept testimony on the proposed project and draft EIS." 57 Fed. Reg. 33007 (U.S. Fish and Wildlife Service, Interior 1992). (Supp. App. C-69-70). The overall goals for the refuge are outlined in the Federal Register and will not be repeated here, except to note that riverine wetlands are to be managed "in a manner consistent with" local and state objectives. *Id.* (Supp. App. C-

72).[8] The Service agreed to work cooperatively with the California Department of Water Resources to develop a voluntary memorandum of understanding regarding elements of that state's Comprehensive Water Plan. *Id.* (Supp. App. C-77-78). *Cf.* 54 Fed. Reg. 14173 (U.S. Fish and Wildlife Service, Interior 1989) (notice of intent to prepare an EIS on proposed National Wildlife Refuge near Cokeville, WY. where service required to enter into agreement with state for water use and management). (Supp. App. C-52).

---

[8]The Federal Register reflects that the Stone Lakes National Wildlife Refuge "would constitute an addition to the National Wildlife Refuge System (System) and would be operated in accordance with the overall mission of the System." 57 Fed. Reg. 33007. (Supp. App. C-67). The Club easement, although made a part of the System, will not be so operated. No public access is provided. The Club retains the rights of hunting and fishing the property; over grazing and ranching; and over oil and gas exploration, drilling and production. (EA, p. A-2). Oil and gas rights are not an idle reservation as drilling has already occurred on site. (EA, p. 25). TWCA and Sabine River Authority raised contravention of the System Act in the courts below as additional justification for relief. (See TWCA Complaint submitted with Motion to Intervene, Vol. 1, Doc. 118).

It is significant that agency applied NEPA early in the Stone Lakes project planning process. The Stone Lakes EIS was finalized before negotiations with landowners began. *Id.*[9] Federal respondents' implication that action under the Texas Bottomland Hardwood Program is too uncertain to trigger NEPA because precise acquisitions were speculative or because implementation depends on negotiations with landowners is, at best, disingenuous.[10] (Fed., p. 4).

---

[9] See 57 Fed. Reg. 33007 (stating that "[n]egotiations leading to potential cooperative agreements will commence immediately. The Service also proposes to initiate negotiations with potential willing sellers of fee and easements interests. The time from project approval to acquisition from any given landowner would vary depending on the willingness of the landowner in negotiating, availability of funding, and closing requirements."). (Supp. App. C-72-73).

[10] The Register notice anticipates that site-specific environmental reviews will be completed as specific habitat plans are prepared. 57 Fed. Reg. 33007 (Supp. App. C-82). This is precisely the situation presented by TWCA's claims--the need for *both* programmatic NEPA review and site-specific review of individual acquisitions under the Texas Bottomland Hardwood Program.

It also is significant that the Stone Lakes EIS recommended an alternative designed to minimize the adverse effects of acquisition, on, among other things, agriculture land conversion. Among the associated "environmental consequences" considered, were impacts that included the loss of agricultural production. 57 Fed. Reg. 20849 (U.S. Fish and Wildlife Service, Interior 1992) (availability of final EIS). (Supp. App. C-63). Obviously, Federal respondents can not genuinely consider the loss of food production, but not the loss of available water supply resources, an environmental impact cognizable under NEPA.

NEPA review of the Club easement acquisition and the above cited examples of NEPA compliance are brought to the Court's attention to demonstrate that the Federal respondents' disavowal of NEPA's scope is both inconsistent with their own actions in this case and a dangerous departure from agency practice. There is real danger that

Federal agencies will use the lower courts' blanket exception to NEPA to actually *decrease* the opportunity for public awareness and participation in Federal actions that affect the human environment.

TWCA urges this Court to consider the contradiction between agency precedent and the legal position taken by federal respondents in their brief, and by the lower courts in their reasoning, as an additional basis sufficient for granting TWCA's petition.

CONCLUSION

If Congress' passage of NEPA does not ensure that human water supplies will not be taken away or indirectly run dry by Federal action without open and adequate consideration of the human consequences, then it ensures nothing. Federal respondents avoided NEPA's "hard look" at nondevelopment acquisitions even though their actions critically impacted use of a resource as elemental to the human

environment as water supply. They now present post hoc rationalizations that such acquisitions simply do not come under NEPA, at all. Likewise, both Federal respondents and the Club seek by their statement of questions presented to hide from the issues TWCA brought to this Court by petition.

TWCA urges the Court to view Federal respondents' actions by their ultimate impact on the human environment and to answer the necessary questions as fully presented by TWCA's petition for writ of certiorari.

Respectfully submitted,

MICHAEL J. BOOTH*
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner Texas Water Conservation Association

* Counsel of Record

No. 91-1927

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

SUPPLEMENTAL APPENDIX C
OTHER AUTHORITIES

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX C

Page

Department of Interior, 516 DM 2.3A

Department of Interior, Departmental Manual.....C-42

54 Fed. Reg. 14173

Notice of Intent to Prepare an Environmental Impact Statement on a Proposed National Wildlife Refuge near Cokeville, WY.....C-46

57 Fed. Reg. 20849

Availability of a Final Environmental Impact Statement for the Proposed Stone Lakes National Wildlife Refuge in South Sacramento County, CA.....C-55

57 Fed. Reg. 33007

Notice of Record of Decision for the Establishment of the Stone Lakes National Wildlife Refuge, Sacramento County, CA.....C-65

SUPPLEMENTAL APPENDIX C

Department of Interior
516 DM 2.3A (3)

Departmental Manual

2.3 Whether to Prepare an EIS [1501.4].

A. Categorical Exclusions [1508.4].

(1) The following criteria will be used to determine actions to be categorically excluded from the NEPA process:

(a) The action or group of actions would have no significant effect on the quality of the human environment, and

(b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.

(2) Based on the above criteria, the classes of actions listed in Appendix 1 to this Chapter are categorically excluded, Department-wide, from the NEPA process. A list of categorical exclusions specific to

bureau programs will be included in each Bureau Appendix to Chapter 6.

(3) The following exceptions apply to individual actions within categorical exclusions. Environmental assessments must be prepared for actions which may:

(a) Have significant adverse effects on public health or safety.

(b) Adversely affect such unique geographic characteristics as historic or cultural resources, park, recreation, or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

(c) Have highly controversial environmental effects.

(d) Have highly uncertain environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects.

(f) Be related to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Adversely affect properties listed or eligible for listing in the National Register of Historic Places.

(h) Affect a species listed or proposed to be listed on the List of Endangered or Threatened Species.

(i) Threaten to violate a Federal, State, local, or tribal law or requirements imposed for the protection of the environment or which require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990

(Protection of Wetlands), or the Fish and Wildlife Coordination Act.

SUPPLEMENTAL APPENDIX C

54 Fed. Reg. 14173

Notice of Intent to Prepare EIS

Fish and Wildlife Service

Notice of Intent to Prepare an Environmental Impact Statement on a Proposed National Wildlife Refuge near Cokeville, WY

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: This notice advises the public that the Fish and Wildlife Service (Service) intends to gather information necessary for the preparation of an Environmental Impact Statement (EIS) for a proposed National Wildlife Refuge near Cokeville, Lincoln County, Wyoming. Public meetings regarding the proposed refuge have been held in November 1987 and November 1988 and enabling legislation for refuge acquisition was passed by the Wyoming Legislature in mid-February 1989. A

supplemental meeting for preparation of the EIS may also be held if deemed necessary by the Service. This notice is being furnished as required by the National Environmental Policy Act (NEPA) Regulations (40 CFR 1501.7) to obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the EIS. Comments and participation in this scoping process are solicited.

DATES: Written comments should be received by May 8, 1989. Future notices will be provided in local news media if it is determined that a public meeting is in order.

ADDRESS: Written comments should be addressed to: Galen Buterbaugh, Regional Director, Region 6, U.S. Fish and Wildlife Service (RW), P. O. Box 25486, DFC, Denver, Colorado 80225.

FOR FURTHER INFORMATION CONTACT: David E. Janes, Wildlife Biologist, U.S. Fish and Wildlife Service (RW), P. O. Box 25486, DFC, Denver, Colorado 80225, Telephone: (303) 236-8148.

SUPPLEMENTARY INFORMATION: David E. Janes is the primary author of this document.

The Service, Department of the Interior, proposes to establish a National Wildlife Refuge in the Bear River valley immediately south of the town of Cokeville, Wyoming, for the purpose of protecting the wet meadowland/river oxbow wetland complex that exists there. The area supports excellent breeding populations of redhead ducks, sandhill cranes, Canada geese and numerous other populations of ducks, marshbirds, and shorebirds. These wetlands are the largest representative complex of this type in Wyoming and are threatened by incompatible agricultural practices,

drainage of oxbows, and potential oil and gas development.

The principal identified alternatives are:

1. No Action--Area would remain as is. No acquisition by the Service.

2. Acquisition/Management By Others--State, Bureau of Land Management, and conservation groups.

3. Protection by existing local, State and federal regulations.

4. Less-Than-Fee Acquisition--Wetland Easements and Management Agreements.

5. Fee Purchase--All lands acquired within boundary in fee title by the Service.

6. Combination of Alternatives--Preferred alternative by the Service. Would involve fee purchase of 22,961 acres in northern end of project area and 3,696 acres in wetland easements in southern end of project area.

The concept of protecting habitat on the Bear River near Cokeville, Wyoming, was first identified in 1978 by the Wyoming Game and Fish Department (Department) and the Service. The Service reviewed the area in 1980 and the Department completed a study of the area in 1984. In July 1987, the Service received the conditional support of the Wyoming Game and Fish Commission and the Lincoln County Commission to proceed with a refuge proposal.

In order to acquire lands with Migratory Bird Conservation Fund monies, it is necessary to have enabling legislation and the consent of the governor of the State in which the refuge is proposed. After a public meeting in Cokeville in November 1987, a bill to authorize the Service to purchase land for a refuge was introduced in the Wyoming Legislature. The bill was disapproved in February 1988.

In response to the Legislature and residents of the Cokeville area, the Service prepared a Development and Management Plan for the Bear Valley Wetlands Proposal. The Management Plan responded to the major questions regarding refuge development, water management, upland management, recreational use, and other issues. Concurrent with release of the Management Plan, the Service held public informational sessions in Cokeville, Evanston, Kemmerer and Casper, Wyoming, and in Randolph, Utah. A formal Public Hearing was held in Cokeville in November 1988 on the refuge proposal and Management Plan. Subsequently, legislation was again introduced in the Wyoming Legislature and was passed. The signed bill (Senate Enrolled Act No. 22) was submitted to Governor Sullivan, who supported the legislative action but did not sign the

Act. The Act became effective without signature.

The enabling legislation imposes certain stipulations on the Service in their refuge proposal. The area of consideration for protection is restricted to a 27,000-acre area on either side of the Bear River immediately south of the town of Cokeville. Acquisition would be from willing sellers only. No condemnation would be permitted except in quiet title actions. The Service must enter into an agreement with the State for water use and management.

The major impacts of the proposal that can be perceived are:

--Perpetual protection of the area for wildlife and wetland values.

--Loss of land ownership by the private sector.

--Gradual shift for community to recreation-oriented economy.

--Major expenditure of public monies for acquisition and development.

--Enhanced waterfowl and other wildlife populations.

--Increased tourism and public use benefits in Lincoln County.

--Decline in the amount of unregulated rangeland for cattle industry.

--Unified water management program for the area.

--Long-term socioeconomic impacts on the region.

The environmental review of this project will be conducted in accordance with the requirements of the NEPA of 1969, as amended (42 U.S.C. 4371 et seq.), NEPA Regulations (40 CFR 1500-1508), other appropriate federal regulations, and Service procedures for compliance with those regulations.

We estimate the draft EIS will be made available to the public by late June, 1989.

Dated: March 31, 1989.

Galen L. Buterbaugh,

Regional Director.

[FR Doc. 89-8228 Filed 4-6-89; 8:45 am]

SUPPLEMENTAL APPENDIX C

57 Fed. Reg. 20849

Availability of a Final EIS

Availability of a Final Environmental Impact Statement for the Proposed Stone Lakes National Wildlife Refuge In South Sacramento County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: This notice advises the public that the Final Environmental Impact Statement (EIS) on the feasibility of establishing a National Wildlife Refuge on or near Stone Lakes in South Sacramento County, California is available for public review. In response to the major issues raised in public and agency comments, the Stone Lakes project planning team recommended changes in the proposed project to reduce social and economic impacts. These recommendations resulted in the development of an additional alternative,

the Mitigated Preferred Alternative. The Mitigated Preferred Alternative is presented and analyzed in detail in the Final EIS.

The most notable changes contained in the Mitigated Preferred Alternative are the reduction in size of the proposed Stone Lakes National Wildlife Refuge to approximately 9,000 acres of land and the establishment of a 9,000 acre "cooperative wildlife management area". These proposed revisions to the project boundary and acquisition programs significantly reduce potential impacts to agricultural practices in South Sacramento County, including the amount of prime farmland that would be taken out of production.

The Mitigated Preferred Alternative also includes measures to endure cooperation with the local vector (mosquito) control district. Major recreational boating use areas in the Delta

Meadows area have been excluded from the proposal. Other major issues that have been addressed include limitations on the use of condemnation, a commitment to avoid the reintroduction of endangered species, and the use of buffers on Service lands to avoid impacting adjacent agricultural operations. A number of other related concerns have also been included in the Final EIS.

A final decision regarding the establishment of the Stone Lakes refuge will not be made on this proposal prior to June 19, 1992. A Record of Decision will be prepared thereafter. Agencies and individuals on the EIS mailing list will receive notice of the Record of Decision.

Copies of the Executive Summer [sic] or Final EIS have been sent to all agencies and individuals who participated in the review of the Draft EIS. Copies of the full Final EIS are available for review at

several locations within the Sacramento Metropolitan area including most local public libraries.

FOR FURTHER INFORMATION CONTACT: Mr. Peter J. Jerome, U.S. Fish and Wildlife Service, Sacramento Realty Field Office, 2233 Watt Avenue, Suite 375, Sacramento, CA 95825-0509; (916)978-4420.

SUPPLEMENTARY INFORMATION: The Stone Lakes project area is a remnant of what was once a vast complex of permanently and seasonally flooded wetlands flanked by riparian forest and prairie. The native plant communities have been greatly changed by the effects of flood control and agricultural operations. Remnants of a variety of native plant communities still exist, particularly in the riparian scrubshrub zones. The needlegrass grasslands that were native to many dryer sites may now be locally extinct.

Perennial lakes, sloughs and streams cover approximately 1,500 acres. Additionally, there are thousands of acres of seasonally flooded wetlands and vernal pools. Emergent vegetation, primarily cattails and hardstem bulrush, is present around the edges of the larger lakes and widespread in the sloughs and seasonally flooded wetlands.

The area provides an important link in the Pacific Flyway. The proposed refuge provides nesting, migration, and wintering habitat for 23 species of waterfowl. Suitable habitat for more than 39 State and Federal candidate or listed species occurs within the project area, including Valley elderberry longhorn beetles, giant garter snakes, Swainson's hawks and Aleutian Canada geese.

In little more than a century, wetlands in California have diminished to approximately four percent of their

historic acreage. Wetland losses have occurred as a direct result of the agricultural, residential, commercial, and industrial development of California lands. The specific threats to the project area come from various quarters. Agricultural conversions to vineyards as well as commercial and residential development of large portions of the project area is imminent. The Sacramento metropolitan area is one of the fastest growing areas within California.

Six alternatives and a mitigated preferred action are presented in the Final EIS. Each alternative description includes refuge acquisition boundaries, acquisition programs and habitat restoration objectives. Each alternative is evaluated for its ability to achieve wildlife and resource goals for the proposed Stones Lakes National Wildlife Refuge. Those goals include the protection of a diverse

assemblage of Central Valley habitats and species, protecting and enhancing habitats for threatened and endangered species protecting and enhancing wetland habitats and adjacent agricultural lands for waterfowl, creating linkages to reduce habitat fragmentation, coordinating land acquisition and management activities with other agency and private refuge managers, providing for public environmental education and wildlife oriented public use, and managing riverain wetlands and adjacent floodplains consistent with flood control objectives.

The U.S. Fish and Wildlife Service's Mitigated Preferred Alternative recommends the establishment of a 9,000 acre national wildlife refuge and the establishment of a 9,000 acres "cooperative wildlife management area". Within the refuge, approximately 3,000 acres would be acquired in fee title, an additional 6,000 acres

would be managed through cooperative agreements with existing public land managers. Within the "cooperative wildlife management area", lands would be protected through conservation easements with private landowners.

The Mitigated Preferred Alternative would seek to preserve approximately 4,100 acres of existing natural habitats, restore 5,700 acres to natural habitat, and enhance 5,300 acres of agricultural lands to benefit wildlife by modifying current management practices. A diversity of existing natural and restored habitats will include permanent wetlands, seasonal wetlands, riparian and oak woodlands, perennial grasslands, and vernal pools.

The remaining alternatives represent various boundary configurations and programs ranging from approximately 7,500 acres to 74,000 acres. The No-Action Alternative (Alternative A) represents the

areas that would remain in public ownership without a national wildlife refuge. Alternative B reflects the minimum land acquisition alternative. The original proposed action is defined by Alternative C and the preferred alternative contained in the Draft EIS by Alternative C_1. Alternatives D and E represent refuge configurations that reflect expanded acquisition areas which include the Cosumnes River floodplain.

The Final EIS examines the environmental consequences associated with each alternative. Impacts related to the conversion of agricultural land to natural habitats include the loss of agricultural production, increased risk of drainage and seepage problems from, created wetlands to existing fields, crop depredation by wildlife, increased pest management problems, effects on flood control and water quality and potential for increased

trespass. Fiscal impacts related to refuge establishment include changes in economic activity, changes in economic development opportunities, reductions in the property tax base, and increased riskiness of agricultural investments.

Dated: April 30, 1992

Marvin L. Plenert.

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 92-11037 Filed 5-14-92; 8;45 am]

SUPPLEMENTAL APPENDIX C

57 Fed. Reg. 33007

Notice of Record of Decision

Fish and Wildlife Service

Record of Decision for the Establishment of the Stone Lakes National Wildlife Refuge, Sacramento County, CA

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of decision and notice of availability of the record of decision document.

SUMMARY: This notice makes available to the public the Record of Decision (ROD) for the establishment of Stone Lakes National Wildlife Refuge (Refuge) and Cooperative Wildlife Management Area. The ROD was prepared in accordance with Council on Environmental Quality regulations, 40 CFR 1505.2. The ROD documents the decision of the U.S. Fish and Wildlife Service (Service) based on the information

contained in the Final Environmental Impact Statement (EIS) for the Refuge, which was filed with the Environmental Protection Agency on May 15, 1992. The Service has selected the Mitigated Preferred Alternatives as described in the Final EIS as the best alternative for implementing the decision to establish the Refuge. Additional clarifications regarding land protection strategies for the area around South Stone Lake have been added. Responses to individual comment letters received by the Service on the Final EIS are included in an appendix to the ROD.

ADDRESSES: To obtain a copy of the Record of Decision and appendix or for further information, contact Peter Jerome, Sacramento Realty Field Office, 2233 Watt Avenue, suite 375, Sacramento, California 95825, telephone (916) 978-4420.

SUPPLEMENTARY INFORMATION:

A. Purpose and Need for the Project

The Service proposes to acquire and/or otherwise protect lands in southwestern Sacramento County, California, for establishment of the Stone Lakes National Wildlife Refuge (Refuge) and a Cooperative Wildlife Management Area. The purpose of the project is to protect and restore native Central Valley, California, habitats and provide educational and recreational opportunities for the public. The Stone Lakes Refuge would constitute an addition to the National Wildlife Refuge System (System) and would be operated in accordance with the overall mission of the System.

Loss of wetland and riparian forest habitats in the Central Valley has contributed to steady decreases in waterfowl and other wildlife populations over the past 30 years. Substantial environmental changes over the last 50 years have also contributed to the

deterioration of fisheries production, floodwater storage, groundwater recharge, sediment control, recreational opportunities and aesthetic values in the region.

Public and agency awareness of the significance of the Stone Lakes area as an important wildlife area has been growing for over 20 years. At the same time, various Federal and State agencies and private organizations have been addressing the problem of dwindling habitat for migratory waterfowl and other wildlife in the Central Valley. The Stone Lakes area could play a major role in meeting the goal of these entities to protect, enhance, and restore associated habitats for fish and wildlife and plant communities.

B. Legislative Authorities and Funding Sources for Refuge Acquisition

The Service has specific responsibility for the welfare of migratory birds,

anadromous fish, and Federally listed endangered animals and plants. The following acts of Congress grant the Service the general authority to acquire land for refuge purposes: the Fish and Wildlife Act of 1956, the Endangered Species Act of 1973, the Emergency Wetlands Resources Act of 1986, the Migratory Bird Conservation Act, and the Migratory Bird Treaty Act. The primary sources of funding for refuge acquisition projects are the Migratory Bird Conservation Fund, Land and Water Conservation Fund, and North American Wetlands Conservation Fund.

C. Public Involvement and Environmental Review

A draft EIS was circulated for public review from May 20 to October 15, 1991. The Service conducted seven public workshops and meetings to answer questions, disseminate information, and accept testimony on the proposed project and draft

EIS. The Service received input from over 6,000 commenters. Comments were received from individuals, organizations, and public agencies. The Final EIS was filed with the Environmental Protection Agency and the Notice of Availability appeared in the Federal Register on May 15, 1992. Responses to individual comment letters received by the Service on the Final EIS are included in an appendix to this ROD.

D. Goals of Stone Lakes National Wildlife Refuge

The overall goals for the Stone Lakes National Wildlife Refuge are to:

1. Preserve, enhance, and restore a diverse assemblage of native Central Valley plant communities and their associated fish, wildlife, and plant species;

2. Preserve, enhance, and restore habitat to maintain and assist in the recovery of rare, endangered, and threatened plants and animals;

3. Preserve, enhance, and restore wetlands and adjacent agricultural lands to provide foraging and sanctuary habitat needed to achieve the distribution and population levels of migratory waterfowl and other water birds consistent with the goals and objectives of the North American Waterfowl Management Plan and Central Valley Habitat Joint Venture;

4. Create linkages between Refuge habitats and habitats on adjacent lands to reverse past impacts of habitat fragmentation on wildlife and plant species;

5. Coordinate Refuge land acquisition and management activities with other agencies and organizations and to maximize the effectiveness of Refuge contributions to regional habitat needs;

6. Provide for environmental education, interpretation, and fish and wildlife-oriented recreation in an urban

setting accessible to large populations; and

7. Manage riverine wetlands and adjacent floodplain lands in a manner consistent with local, State, and Federal flood management; sediment and erosion control; and water quality objectives.

E. U.S. Fish and Wildlife Service Land Acquisition and Protection Programs

The Service will employ land protection methods such as cooperative agreements, conservation easements, and fee title acquisition to secure the minimum interest in lands necessary to accomplish Refuge goals. Negotiations leading to potential cooperative agreements will commence immediately. The Service also proposes to initiate negotiations with potential willing sellers of fee and easement interests. The time from project approval to acquisition from any given landowner would vary depending on the willingness of

the landowner in negotiating, availability of funding, and closing requirements.

Consistent with Service policy commitments contained in the Mitigated Preferred Alternative, the Service has imposed administrative constraints on the use of eminent domain. For example, the Service will not use the power of Eminent Domain, i.e., condemnation, so long as existing or proposed agricultural land uses are consistent with the Sacramento County General Plan (1980) and its current proposed revisions (November 1990). In addition, the Service will implement eminent domain proceedings as a policy of last resort and only on a case-by-case basis which takes into account the relative compatibility of the specific land use at issue with Refuge goals.

F. Cooperative Partnerships

1. Commitments Contained in the Mitigated Preferred Alternative

During the comment period on the Final EIS, the American Farmland Trust encouraged the Service to give additional consideration to developing an innovative, cost-effective public/private alternative that would accomplish the goals of the Service and local landowners in the area of South Stone Lake. Support for the concept of a partnership between nonprofit land trust organizations and the Service is affirmed in the Mitigated Preferred Alternative contained in the Final EIS.

The Service encourages local efforts to develop land-use activities consistent with the purposes of the proposed Refuge. Within the proposed Refuge project area, the Service would seek to protect and manage sufficient acreage to accomplish Refuge goals. Lands in the project areas that are permanently protected in private ownership consistent with Refuge goals would satisfy this requirement (i.e.,

Federal acquisition would not be necessary). Important factors in determining the adequacy of protection would include commitment to and enforcement of perpetual covenants, commitment to habitat restoration and enhancement objectives, and commitment to migratory bird foraging and sanctuary requirements as described in the Final EIS.

Perpetual easements acquired through third-party interests are supported by the Services if they accomplish Service protection and management goals. Any property enrolled in such a program would not be considered part of the Refuge but, more appropriately, would be a component of a "Cooperative Wildlife Management Area" that would seek to preserve and enhance both agricultural and wildlife values.

2. Additional Commitments

In addition to commitments made by the Service in the Mitigated Preferred

Alternative, the Service will work with The American Farmland Trust, the North Delta Conservancy, and other nonprofit land trust organizations to foster a cooperative public/private partnership whose primary objectives are to preserve both agricultural and wildlife values.

A method for achieving a successful partnership would be to develop and implement the terms of a voluntary Memorandum of Understanding (MOU). An MOU could address mutually agreeable land protection measures in the South Stone Lake area and elsewhere. The Service will pursue this MOU based on the following principles:

(a) A common interest in protecting, enhancing, restoring, and managing wildlife uses in perpetuity;

(b) A common interest in protecting prime and important agricultural land for food production in perpetuity;

(c) A common interest in protecting existing open space in perpetuity;

(d) A recognized role of private landowners to accomplish both habitat preservation and enhancement goals as well as agricultural production goals;

(e) A need for ongoing cooperation, communication, and coordination among all parties;

(f) A commitment to act as good neighbors, recognizing the economic and wildlife objectives of both individual and public agency ownerships;

(g) A process to ensure that when fee title and conservation easement acquisition is desirable or necessary, a process is in place to ensure full coordination and cooperation with all potentially affected parties.

The Service agrees to work cooperatively with the California Department of Water Resources to develop a

voluntary MOU. Consistent with Refuge goals, this MOU will address appropriate elements of the Governor of California's Comprehensive Water Plan (April 1992) and associated environmental benefits.

G. Mosquito Abatement

The Service recognizes that an integrated mosquito suppression program can be developed that is consistent with the goals of the Stone Lakes Refuge. Management of water and vegetation along with appropriate biological and chemical control can effectively manage the mosquito population, while protecting Refuge resources, and ensuring the health, safety and welfare of the public.

The Service will continue to work with the Sacramento-Yolo Mosquito and Vector Control District to develop an MOU that effectively addresses the potentially adverse impacts on mosquito abatement as described in the Final EIS. The MOU will

ensure that mitigation measures described in the Final EIS will reduce these impacts to acceptable levels.

H. Basis for the Decision

The Mitigated Preferred Alternative represents a revision of the Service's Preferred Alternative (Alternative C_1) identified in the draft EIS. Under the Mitigated Preferred Alternative, the Stone Lakes Refuge would consist of an approximate 9,150-acre core area encompassing Upper and Lower Beach Lakes and North and South Stone Lakes. The Service would also support and participate in the establishment of Cooperative Wildlife Management Area approximately 9,100 acres in size.

The Mitigated Preferred Alternative incorporates Service policy commitments designed to minimize the adverse effects of Refuge protection, acquisition, and management programs on recreational use on

navigable waters, prime agricultural land conversion, farming practices, land values, and landowner's access to loans, and to ensure cooperation with the Sacramento-Yolo Mosquito and Vector Control District. Given the environmental and economic impacts and technical feasibility of the project, the Mitigated Preferred Alternative would best meet the identified goals of the proposed Refuge and the agency's statutory mission and responsibilities.

I. Alternatives Considered

Six alternatives, in addition to the Mitigated Preferred Alternative, were considered in detail in the Final EIS. These alternatives represent various programs and boundary configurations ranging from approximately 7,500 acres to 74,000 acres. The No Action Alternative represents areas that would remain in public ownership without a national

wildlife refuge. Alternative B reflects the minimum land acquisition alternative. The original proposed action is defined by Alternative C and the Preferred Alternative contained in the Draft EIS is defined by Alternative C_1. Alternatives D and E represent Refuge configurations that reflect expanded land protection areas to include the Cosumnes River floodplain.

Of the seven alternatives considered in detail, all are environmentally preferable to the No Action Alternative. Alternatives C, C_1, D, E, and the Mitigated Preferred Alternative would meet all project goals by providing moderate to very substantial environmental benefits. Alternative A would result in little or no change from existing conditions.

Several off-site alternatives were considered but rejected from detailed analysis because they did not satisfy major goals established for the Refuge. The

Stone Lakes study area is characterized by threats and conflicts from urbanization and agricultural conversions that make land protection a priority in order to secure existing habitat values.

J. Mitigation and Monitoring

Mitigation measures that would avoid or reduce adverse impacts of habitat protection, land acquisition and Refuge management are identified in the Final EIS. These measures would reduce significant and potentially significant impacts to less than significant impacts. The Service will implement these mitigation measures as Refuge lands are acquired and specific habitat restcration and Refuge development plans are prepared. Site specific environmental reviews will be completed for projects requiring additional National Environmental Policy Act compliance.

K. Conclusion

Based on review and consideration of the Final Environmental Impact Statement for Stone Lakes National Wildlife Refuge (May 1992), public comments on the EIS, and other relevant factors, I am selecting the Mitigated Preferred Alternative and the clarifications contained in this Record of Decision as the best alternative for implementing the decision to establish the Refuge. Environmental harm will be avoided or minimized through implementation of this action.

Dated: July 17, 1992

Marvin L. Plenert.

Regional Director, Region 1 U.S. Fish and Wildlife Service.

[FR Doc. 92-17491 Filed 7-23-92; 8:45 am]